

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY **Jan 23 2025**

Court of Common Pleas

Jean H. Toal, Circuit Court Judge **SC Court of Appeals**

Civil Action No. 2023-CP-40-04072

Michael L. Perry and Lonnie Long,Respondents,

v.

American Industrial Industries, et al.

Of whom Johnson & Johnson; LLT Management, LLC f/k/a LTL Management, LLC;
Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc. are the.....Appellants.

RETURN TO MOTION FOR LIMITED REMAND

Charles W. Branham, III
(SC Bar No. 106178)
**DEAN OMAR BRANHAM
SHIRLEY, LLP**
302 N. Market Street, Suite 302
Dallas, TX 75202
T: 214-722-5990
F: 214-722-5991
tbranham@dobslegal.com

Theile B. McVey (SC Bar No. 16682)
Jamie D. Rutkoski (SC Bar No. 103270)
**KASSEL MCVEY ATTORNEYS AT
LAW**
1330 Laurel Street
Post Office Box 1476
Columbia, SC 29202-1476
T: 803-256-4242
tmcvey@kassellaw.com
jrutkoski@kassellaw.com

Attorneys for Respondents

Respondents Michael L. Perry and Lonnie Long oppose Appellant Johnson & Johnson's¹ motion for limited remand as lacking support in South Carolina law or the facts of this case. The motion should be denied so that Johnson & Johnson's appeal may move forward expeditiously.

BACKGROUND

This appeal is from a jury verdict rendered in favor of Respondents Michael L. Perry and Lonnie Long on August 15, 2024. A jury found Johnson & Johnson negligent and strictly liable, and awarded \$32.6 million in compensatory damages. The award consisted of \$23 million to Mr. Perry and \$9.6 million to his husband, Mr. Long. The jury also found Johnson & Johnson was willful, wanton, or reckless and awarded \$30 million in punitive damages.

The trial court conducted extensive post-trial proceedings. Johnson & Johnson filed a 95-page motion for a new trial absolute, judgment notwithstanding the verdict, and new trial *nisi remittitur*, in addition to three other motions seeking various forms of post-trial relief. Respondents opposed the motions, and the trial court heard two days of oral argument on September 24 and 25, 2024.

On December 11, 2024, the trial court entered an 86-page order deciding Johnson & Johnson's motions. The court denied the motions for judgment notwithstanding the verdict and new trial absolute. The court granted the motion for new trial *nisi remittitur*, reducing Mr. Perry's award by \$4 million and Mr. Long's

¹ Appellants are Johnson & Johnson; LLT Management, LLC f/k/a LTL Management, LLC; Kenvue, Inc.; and Johnson & Johnson Holdco (NA), Inc. They are referred to herein collectively as "Johnson & Johnson."

award by \$3 million. The punitive damages award was also reduced by \$5 million. After a full setoff for pretrial settlements was applied, judgment was entered against Johnson & Johnson for \$39,401,250.

Appellants have unreasonably sought to delay the progress of their own appeal with this motion to remand. Mr. Perry is dying of mesothelioma, an incurable asbestos-related cancer. At trial, expert testimony established that the average life expectancy for a person with mesothelioma is 18 months. Mr. Perry was diagnosed with mesothelioma in June 2023, at the age of 53, and is now at the outside limit of that 18-month typical life expectancy. The delay sought by Johnson & Johnson could mean that he does not survive to see the resolution of this appeal of his jury verdict against Johnson & Johnson.

ARGUMENT

Johnson & Johnson has failed to demonstrate that it would be proper to remand this case to the trial court for consideration of its motion under Rule 59(e) of the South Carolina Rules of Civil Procedure. It does not cite a single case in which this Court has remanded for this purpose.

The only case Johnson & Johnson does rely on, *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), specifically instructs parties *not* to do what Johnson & Johnson has done in filing both a Rule 59(e) motion and a notice of appeal. *Elam* holds that a Rule 59(e) motion tolls the time for filing a notice of appeal. 361 S.C. at 21, 602 S.E.2d at 778. In its discussion, the Supreme Court addresses a situation in which a party “attempt[s] to file both a

Rule 59 motion and a notice of appeal.” *Id.* at 20 n.2, 602 S.E.2d at 778 n.2. “If this does occur, one or the other will be inappropriate depending on whether the motion is both timely under Rule 59 and permissible under our ruling today.” *Id.* The appealing party bears the responsibility to determine whether it is appropriate to file *either* a Rule 59 motion *or* a notice of appeal. *Id.* Both should not be filed: “we caution parties not to attempt to avoid this responsibility by the simple expedient of filing both.” *Id.*

Johnson & Johnson has disregarded *Elam*’s instruction not to file both a Rule 59 motion and a notice of appeal. It attempts to circumvent its responsibility by claiming to “*feel obligated out of an abundance of caution* to file and serve a notice of appeal within thirty days after receiving written notice of entry of judgment to avoid a court or the opposing party taking the position that the Rule 59(e) motion to reconsider does stay the time for appeal.” Motion for Limited Remand, at p. 2 (emphasis added). This is not the proper approach. Johnson & Johnson is required to choose between filing its Rule 59 motion or a notice of appeal. Instead, by filing both it has acted in contravention of *Elam*.

Johnson & Johnson failed to choose between its Rule 59 motion and its notice of appeal, as instructed by *Elam*, and instead seeks to shift that responsibility to this Court. Johnson & Johnson also seeks to force Respondents to take a position on which avenue is appropriate, which they are not going to do.² Johnson & Johnson’s improper

² When a timely post-trial motion is pending in the trial court, the notice of appeal is premature. *Hudson v. Hudson*, 290 S.C. 215, 216, 349 S.E.2d 341, 341 (1986). For

attempt to have it both ways, and have this Court remand for additional trial court proceedings while the case is on appeal, means unreasonable delay in the resolution of Mr. Perry's case. The requested remand has no basis in the procedures of this Court and will unnecessarily complicate the proceedings. This Court should decline to give Johnson & Johnson special treatment that falls outside the South Carolina rules governing civil procedure and appellate practice.

CONCLUSION

The Court should deny Johnson & Johnson's motion for limited remand so that the instant appeal may proceed forward under the Rules of Appellate Procedure.

January 23, 2025

Respectfully Submitted,

s/Theile B. McVey

Theile B. McVey (SC Bar No. 16682)

Jamie D. Rutkoski (SC Bar No. 103270)

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, SC 29202-1476

T: 803-256-4242

tmcvey@kassellaw.com

jrutkoski@kassellaw.com

Charles W. Branham, III (SC Bar No. 106178)

Rachel A. Gross (Admitted *Pro Hac Vice*)

DEAN OMAR BRANHAM SHIRLEY, LLP

302 N. Market Street, Suite 302

Dallas, TX 75202

T: 214-722-5990

tbranham@dobslegal.com

rgross@dobslegal.com

Columbia, South Carolina.

Attorneys for Respondents

purposes of this Return, Respondents take no position on whether Johnson & Johnson's Rule 59(e) motion was timely.